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Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI, TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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INDEX.

PAGE

Report of opinions below 2

Jurisdiction 2

Question presented 3

Statutes involved 3

Statement of the case 5

Argument

I. The issue presented substantially and directly affects the measure of damage in Federal Employers' Liability Act cases, and constitutes a federal question of substance not heretofore determined by this Court 7

II. The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal but not exceed the extent of injury 9

Conclusion 19

Appendix 21

Table of Authorities.

Federal Authorities.

American Railway Express Co. v. Levee, 263 U.S. 19.... 2

Chesapeake & Ohio Railway Co. v. Gainey, 241 U.S. 494 ..... 8, 13

Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485 ..... 7, 8, 13, 14

Dow v. Humbert, et al., 91 U.S. 294 7

Employers' Liability Cases, 207 U.S. 463 8

Gulf, C. & S. F. Ry. Co. v. Moser, 275 U.S. 133 ..... 8, 14

Illinois Central R. Co. v. Crail, 281 U.S. 57 8

Louisville & Nashville R. R. Co. v. Holloway, 246 U.S. 525 ..... 13, 14

Market Street Railway Co. v. R. R. Comm., 324 U.S. 548 2

Miller v. Robertson, 266 U.S. 243 8

Milwaukee etc. R. R. Co. v. Arms et al., 91 U.S. 489 7

Second Employers' Liability Cases. 223 U.S. 1 8

Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146 8

Wicker v. Hoppock, 6 Wall. 94 7

Chicago & North Western Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir.) 16

Southern Pacific Co. v. Guthrie, 186 F. 2d 926 16

Stokes v. United States, 144 F. 2d 82 (2nd Cir.) 15

Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F. 2d 302 (7th Cir.) 18

Cole v. Chicago, St. P. M. & O. Ry. Co., 59 F. Supp. 443 16

Title 26 U. S. C. § 12 10

Title 26 U. S. C. §§ 22(a), 22(b)(5) 10, 15

Title 28 U. S. C. §§ 1257(3), 2101(c) 2

Title 45 U. S. C. §§51-60 3

38 Stat. 166 9

35 Stat. 65 8

34 Stat. 232 8

STATE AUTHORITIES.

Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 ..... 11, 15

Hall v. Chicago & North Western Ry. Co., 349 Ill. App. 175, 110 N.E. 2d 654 12

Hall v. Chicago & North Western Ry. Co., 1 Ill. App. 2d 552, 118 N.E. 2d 29 13

Smith v. Pennsylvania R. Co., 99 N.E. 2d 501 (Ct. of App. of Ohio) 16

Texas & N. O. R. Co. v. Pool, 263 S.W. 2d 582 (Tex. Ct. of Civ. App.) 16

Ill. Rev. Stats. - 1953, Ch. 110, §§ 199(2). 259.44 2

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vs.

JOHN MARGEVICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI, TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Petitioner, being aggrieved by an erroneous decision of the Appellate Court of Illinois, First District, concerning a novel question substantially affecting the measure of damages in all Federal Employers' Liability Act cases, prays for a writ of certiorari to issue so that this Court may review and reverse the decision of the aforesaid Appellate Court in the above entitled cause.

REPORTS OF OPINIONS BELOW.

The opinion of the Appellate Court is reported at 1 Ill. App. 2d 162 and 116 N.E. 2d 914, and is set forth in an appendix hereto.

The Superior Court of Cook County, being the trial court below, and the Illinois Supreme Court, which denied a petition for leave to appeal from the judgment of the Appellate Court, issued no written opinions.

Jurisdiction.

The judgment of the Appellate Court was entered on December 30, 1953 (R. 284), and a petition for leave to appeal from this judgment was denied by the Supreme Court of Illinois on May 18, 1954 (R. 293). Under Illinois law the failure of the Supreme Court to grant leave to appeal rendered the Appellate Court judgment final, and subject to no further review except by petition for rehearing in the Supreme Court, the filing of which petition is not mandatory. *Ill. Rev. Stats.* 1953, ch. 110, §§ 199 (2), 259.44. *Market Street Railway Co.* v. *Railroad Comm. of California,* 324 U. S. 548, 551.

This petition is filed within ninety days from the denial of the petition for leave to appeal. Accordingly, the jurisdiction of this Court to review the judgment of the Appellate Court by writ of certiorari is invoked under Title 28 U.S.C. §§ 1257(3) and 2101(c). See: *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20-21.

Question Presented.

This case involves an action for damages for personal injuries brought by the respondent, John Margevich, against the petitioner, Chicago and North Western Railway Company, under the Federal Employers' Liability Act, as amended (Title 45 U.S.C. §§ 51-60).

The sole question presented by this petition is whether a trial court commits reversible error in refusing to instruct the jury, when properly requested, concerning the applicability of the federal income tax to an amount awarded as damages for personal injuries.

Statutes Involved.

The only statute involved is the Federal Employers' Liability Act, Title 45 U.S.C. §§ 51-60. The only sections of this Act pertinent to the issue presented are Sections 1 and 6 (Title 45 U.S.C. §§ 51, 56). These sections are set out verbatim below:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect

or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Title 45 U.S.C. § 51.

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." Title 45 U.S.C. § 56.

Statement of the Case.

This action was brought under the Federal Employers' Liability Act, as amended (U.S.C. Title 45, Secs. 51-60), by a 66-year old car repairman in petitioner's employ for injuries suffered when he fell from a scaffolding while straightening a grabiron on a box car (R. 1a-4a, 6a). Respondent (plaintiff below) alleged that the petitioner (defendant below) was negligent in various respects (R. 1a-4a). Petitioner denied that it was guilty of any negligence and asserted that the sole proximate cause of the accident was respondent's own negligence (R. 4a-5a).

The jury rendered a verdict for respondent in the amount of $37,500 (R. 7a). This amount was reduced by a remittitur of $7,500 (R. 13a-14a). On appeal to the Appellate Court of Illinois, First District, the final judgment for respondent in the amount of $30,000 was affirmed (R. 272-284).

The following income tax instruction was requested by petitioner in the trial court (R. 245, 247):

> "You are instructed that under the present provisions of the Internal Revenue Code of the United States any amount paid plaintiff by defendant under a verdict of this jury is exempt from the payment of federal income taxes for the year of receipt of said amount, although the amount of any dividends, interest, gain, profits or income derived from any such amount paid plaintiff by defendant under a verdict of this jury would not be exempt from the payment of federal income taxes."

This instruction was refused (R. 247).

The trial court's error in refusing the instruction was assigned as a ground in support of petitioner's motion for new trial (R. 7a, 10a). Petitioner's motion was denied

(R. 14a). The propriety of the trial court's refusal of the instruction was argued before and passed on adversely to petitioner by the Appellate Court (App. 26-27).[1] No contention has been made that the refused instruction fails to state accurately and concisely the applicability of the federal income tax to damage awards.

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1 Other grounds for reversal of the trial court judgment, which were properly preserved in the record, were also argued and passed on by the Appellate Court (App. 22). Petitioner believes that the Appellate Court also erred in its disposition of these issues. These matters are not raised in this petition, however, because of petitioner's belief that the issue presented here is of such general importance in the administration of F.E.L.A. cases that it should not be obscured by any considerations limited to the facts of this particular case.

ARGUMENT.

I.

The issue presented substantially and directly affects the measure of damages in Federal Employers' Liability Act cases, and constitutes a federal question of substance not heretofore determined by this Court.

The stated purpose of the Federal Employers' Liability Act (Title 46 U.S.C. §§ 51-60), is to render railroads "liable in damages" for the personal injuries or deaths of railroad employees who are injured or killed while in the railroad's employ as a result of the railroad's negligence. The "proper measure of damage" in F.E.L.A. cases, as this Court stated in *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 491, "must be settled according to general principles of law as administered in the Federal Courts."

It has long been a basic principle of the law of damages that compensation to the injured should equal, but should not exceed, the injury suffered. Thus in *Wicker* v. *Hoppock*, 6 Wall. 94, 99, this Court stated in 1867:

> "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."

Cf. *Milwaukee, etc. R. R. Co.* v. *Arms, et al.*, 91 U. S. 489, 492 (1875).

Dow v. *Humbert, et al.*, 91 U. S. 294, 299 (1875) 299 (1875).

The same principle of damages, whether in contract or tort, has often been reiterated since the adoption of the

first valid Employers' Liability Act in 1908.[1] In *Illinois Central R. Co.* v. *Crail*, 281 U. S. 57 (1930), this Court at page 63 pointed out that "the basic principle underlying common law remedies [is] that they would afford compensation only for the injury suffered." Cf. *Standard Oil* v. *Southern Pacific Co.*, 268 U, S, 146, 155 (1925); *Miller* v. *Robertson*, 266 U. S. 243, 257 (1924).

This Court has also established that damage awards in F.E.L.A. cases constitute no exception to this basic principle. In *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485. this Court held that despite the uncertainties and evidentiary difficulties involved, the future earnings of a deceased employee must be discounted to present value. In holding that a failure to consider the earning power of money would result in an unwarranted windfall to plaintiffs over and above their actual loss, this Court said at page 489:

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 70 71; *American R. R. of Porto Rico* v. *Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado & C. Ry.* v. *McGinnis*, 228 U. S. 173, 175. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded."

See also: *Chesapeake & Ohio Ry. Co.* v. *Gainey*, 241 U. S. 494; *Gulf, C. & S. F. Ry.* v. *Moser*, 275 U. S. 133.

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[1] The first Employers' Liability Act was established by an act of Congress on July 11, 1906. 34 Stat. 232. This was held invalid in the Employers' Liability Cases, 207 U. S. 463. The Act of April 22, 1908 (35 Stat. 65) was upheld in the Second Employers' Liability Cases, 223 U. S. 1.

This petition involves two important aspects of the relationship between the federal income tax and damage awards under the F.E.L.A. Petitioner submits that the extent to which a jury is apprised of this relationship goes directly to the maintenance or vitiation of the basic principle referred to above and the measure of damages in F.E.L.A. cases. The issue before the court is therefore a federal question of substance. It has never heretofore been decided by this Court.

II.

The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal, but not exceed the extent of injury.

The Employers' Liability Act of 1908 was passed five years prior to the passage of the Sixteenth Amendment and the first valid income tax act in 1913. 38 Stat. 166. Under the 1913 Act, net incomes were subject to a normal tax of only one per cent per annum. There was also included under that Act an additional tax graduated upwards to a maximum of only six per cent per annum for that portion of net incomes in excess of $500,000. Compensation received for personal injuries was not put in any special category, but was included as ordinary income.

Both the tax rates and the tax treatment of compensation for personal injuries differ substantially under the present law, under which, in addition to the normal tax of three per cent per year on all net income, there is also applicable a graduated surtax on the net income of in-

dividuals extending, for example, from $17,220 on net incomes of $38,000 to $150,820 on net incomes of $200,000. Internal Revenue Code, Title 26 U.S.C. §12. Compensation for personal injuries is specifically excluded from gross income and is exempt from taxation, although dividends and other earnings from investments, regardless of source, are included as gross income.[1] As a result of the marked increases in tax rates and substantive changes in the definition of taxable income, it is clear that the effect of the income tax on F.E.L.A. and other personal injury awards has been drastically altered.

The existence of high tax rates is a matter of common knowledge. But the fact that the income tax is not applicable to certain categories of money receipts, such as compensation received for personal injuries, constitutes a technical exception in the Code which is not a matter of such common knowledge. The problem faced by a jury involved in a conscientious attempt to equate an award of damages with actual injuries suffered must be considered in this light, for whenever damages are erroneously re-

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[1] Title 26 U.S.C. §22(b) provides in pertinent part:

"(b) The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(5) Compensation for injuries or sickness. * * * the amount of any damages received whether by suit or agreement on account of such injuries or sickness, * * *."

Section 22(a) provides in part:

"(a) General definition. 'Gross income' includes gains, profits and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

garded by jurors as taxable, a natural inclination to offset the presumed tax effect will necessarily result in verdicts far in excess of the compensatory award intended.

This aspect of the problem was clearly recognized by the Missouri Supreme Court in *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S. W. 2d 42. The court there announced as a prospective rule that on request, trial courts should give instructions in substantially the following form (251 S.W. 2d 45):

> " 'You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federal or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make.' "

The practical considerations compelling this conclusion were concisely set forth as follows (251 S.W. 2d 45):

> "Present economic conditions are such that most citizens, most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes. Under the Federal and State income tax laws of both Arkansas and Missouri the net income of all persons is taxable except such as is specifically exempted. Few persons, other than those who have had special occasion to learn otherwise, have any knowledge of the exemption involved in this case. It is reasonable to assume the average juror would believe the award involved in this case to be subject to such taxes. It seems clear, therefore, that in order to avoid any harm such a misconception could bring about, it would be competent and desirable to instruct the jury that an award of damages for personal injuries is not subject to Federal or State income taxes.
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"Can there be any sound reason for not so instructing the jury? We can think of none. Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes."

In *Hall* v. *Chicago and North Western Ry. Co.*, 349 Ill. App. 175, 110 N. E. 2d 654, the Third Division of the First District of the Illinois Appellate Court, held it proper for defendant's counsel to inform the jury during oral argument that an amount received as compensation for personal injuries is not subject to the income tax. In so holding, the court stated at 110 N. E. 2d 660:

"Why should the truth be withheld from the jury; why should they be allowed to speculate as to whether their award would be subject to income tax? In reaching their verdict, the jury are fixing an amount which, when received by plaintiff, will be adequate compensation for the specific injuries suffered by him, including loss of earnings, pain and suffering, physical disability, and the nature, extent and permanence of the injuries, at the same time taking into consideration, as they may in Federal liability employment actions, mitigation of damages on account of plaintiff's contributory negligence. In reaching their decision, the jury in all likelihood will consider how much of an award the plaintiff will actually get net, not an amount from which income taxes will have to be deducted. If the jury determine that $50,000 is the correct amount, they will presumably award that sum if they feel there will be no income tax; on the other hand, if they believe there is to be an income tax paid on that amount under the law, they will award a much larger sum in the hope that after the

tax has been paid, plaintiff will still be able to retain $50,000." [1]

When consideration is given both to the nature of jurors' reactions to an erroneous conception of the income tax law, as described in these opinions, and to the amount of error in computing awards that can thereby result, as reflected in current tax rates, the simple point, that substantial prejudice to defendants and windfalls to plaintiffs result from the refusal of a proffered instruction on the non-taxability of personal injury awards, becomes belabored by further comment.

But the income tax problem is not resolved by an instruction limited to the non-taxability of the lump-sum award itself.

It is by now axiomatic that in the calculation of damages necessary to compensate for loss of future earnings, the total amount of such future earnings must be discounted to present value, because of the generally recognized fact that lump-sum awards can reasonably be expected to earn interest, dividends or other income throughout the period for which future earnings have been estimated. *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485, 490; *Chesapeake & Ohio Railway Co.* v. *Gainey*, 241 U. S. 494; *Louisville & Nashville R. R. Co.*

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[1] The principal question decided in this first Hall case involved the income tax matter discussed above. From an order of the Appellate Court remanding the cause with directions to reinstate or restore the judgment, a petition for leave to appeal to the Supreme Court of Illinois was dismissed as premature. On remand, judgment was again entered for plaintiff. On appeal from this second judgment, the Appellate Court of Illinois, First District, First Division, in Hall v. Chicago & N. W. Ry. Co., 1 Ill. App. 2d 552, 118 N. E. 2d 29 again reversed the judgment and remanded the cause on the ground that there was no evidence to support any charges of negligence. From this decision of the Appellate Court, a petition for leave to appeal to the Supreme Court of Illinois has been granted.

v. *Holloway*, 246 U. S. 525, 528; *Gulf, Colorado & Santa Fe Railway Co.* v. *Moser*, 275 U. S. 133, 136. Accordingly, it is incumbent on the jury in determining damages to consider the probable return on any lump-sum award presently invested.

The determination by a jury of the future rate of return on an amount presently invested is necessarily conjectural. Future earnings, whether in the form of interest, dividends or rent, depend on a variety and combination of economic factors, the effects of which no jury is expected to determine with certainty. Indeed this Court has held that any attempt to subject the jury's estimate to "rigid mathematical limitations" constitutes error. *Louisville & Nashville R. R. Co.* v. *Holloway*, 246 U. S. 525, 528. Yet the impossibility of mathematical certainty affords no justification for keeping a jury ignorant of those factors which, although variable, are material to a determination of a future rate of return on an investment made under the circumstances disclosed by the particular case. *Chesapeake & Ohio Ry. Co.* v. *Kelly, supra*, pp. 490-491.

In *Gulf, Colorado & Santa Fe Ry. Co* v. *Moser, supra*, at page 135, this Court held as material error a trial court refusal to instruct the jury to calculate an award on the basis of the 'highest *net* rate" of interest that could be safely earned (emphasis added). Since it is error to refuse to instruct, when requested, that present value should be computed with reference to the "highest net rate" of earnings, it becomes of vital importance to apprise the jury of such information as will minimize conjecture in the determination of the net rate, particularly where needless speculation produces substantial error. It is precisely this type of needless and misleading conjecture which is eliminated from jury deliberations by the second

portion of the instruction here in issue, relating to the taxability of earnings on the presently invested non-taxable damage award.

Having once been properly instructed as to the non-taxability of a personal injury damage award, what lay jury can be safely presumed to recognize the taxability of the earnings of the award.[1] Yet the failure to distinguish between the non-taxibility of money received on an award and the taxability of earnings thereon necessarily prejudices plaintiffs, whose lump-sum award is thereby reduced to the extent that the gross earnings rate rather than the net earnings rate is used as a discount factor.

This problem has received inadequate consideration in state courts. In *Dempsey* v. *Thompson, supra,* at page 46, the Missouri Supreme Court indicated that although a refusal to instruct concerning the non-taxability of the actual personal injury award is material error, it would not consider as error any refusal to inform the jury that earnings from such awards were taxable. The Court dismissed the instruction as being too speculative. In the instant case, the Illinois Appellate Court based its holdings on this issue solely on the authority of the *Dempsey* case (App. 26-27). We submit that the extent of information to be given juries in F.E.L.A. cases regarding the application of the federal income tax will never be resolved by any such summary disposition.

The case cited by the Missouri Court in support of its holding, and similar cases, some of which were cited below by respondent, uniformly involve a separate and entirely inapplicable issue. *Stokes* v. *United States,* 144 F. 2d 82,

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[1] That such earnings are taxable is, of course, uncontroverted here. Title 26 U.S.C. sec. 22(a), *supra.*

87 (2nd Cir.); *Chicago and North Western Ry Co.* v. *Curl*, 178 F. 2d 497, 502 (8th Cir.); *Southern Pacific Co.* v. *Guthrie*, 186 F. 2d 926, 927 (9th Cir.); *Texas & N. O. R. Co.* v. *Pool*, 263 S.W. 2d 582, 590 (Texas Ct. of Civ. App.); *Smith* v. *Pennsylvania R. Co.*, 99 N.E. 2d 501, 504 (Ohio Ct. of App.). In each of these cases it was held that instructions or evidence regarding the deduction of a *specific* amount from future earnings for income tax liability were too speculative and therefore improper.

The latter portion of the instruction offered below, however, consists only of a simple recitation of the applicable law. It contains no direction that any deduction of a specific amount be made from future gross earnings on personal injury awards presently invested. Under the instruction offered, the jury's deliberations are not confined to "rigid mathematical limitations." The sole function and effect is to inform the jury and to remove conjecture concerning the law governing taxability of earnings from investments which are in themselves non-taxable.

The court below summarily disposed of the entire instruction on the stated grounds that the latter portion is too speculative. But once granted the propriety of the first portion, the issue is not whether the second portion is speculative, but rather whether greater or lesser speculation results in the absence of the second portion.

In a frequently cited United States District Court decision, *Cole* v. *Chicago, St. P. M. & O. Ry. Co.*, 59 F. Supp. 443, 445, the trial judge refers to his own assumption that the jury had considered how future earnings might be affected by taxes in determining damages for loss of future earnings. The assumption is a sound one. Jurors, realizing from their own common knowledge and experience the

burden of taxes, may ordinarily be expected to give some weight to this impact in determining the amount of future earnings. This common knowledge and the effect given to it by the jury differ substantially, of course, from the type and effect of an erroneous instruction or evidence tending to reduce the impact of future taxes to mathematical certainty.

But while jurors might also be presumed to have common knowledge concerning the taxability of earnings from funds presently invested, this presumption disappears where the jury has been previously instructed that the invested funds themselves are not taxable. The latter portion of the instruction is therefore essential in order to assure the jury's giving the ordinary consideration it is presumed to give to the effect of future income taxes.

The portion of the proffered instruction found improper in the court below is, of course, one which operates in favor of plaintiffs. It was offered by petitioner, however, neither through inadvertence nor an inexplicable desire to further the cause of adverse litigants. It was offered as being necessary to a complete restatement of the applicable provisions of the Internal Revenue Code, and as a logical and proper corollary to the fundamentally important instruction concerning the non-taxability of the damage award itself. It is inevitable that in future cases plaintiffs for the same reasons will regularly offer the second portion of the instruction.

Eventually there must be an authoritative resolution of the questions of whether the refusal to instruct as to either or both of these provisions of the Internal Revenue Code constitutes material error. The instant petition is undoubtedly unique in the opportunity it presents for the resolution of both issues.

The Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 191 F. 2d 302, 309, had occasion to observe as follows:

> "The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice."

The Federal Employers' Liability Act was conceived by Congress as a means for railroad employees to recover compensation for actual injuries. To permit this Act to become the instrument by which excessive verdicts are regularly obtained is to pervert the intent of Congress by imposing crushing costs on the railroad industry in no way related to the economic effects of its negligence or alleged negligence.

Certainly the rendering of an instruction concerning the applicability of the income tax to F.E.L.A. personal injury awards is not the entire answer to a hard problem. Yet it is difficult to conceive of a trial procedure which can more effectively eliminate unnecessary conjecture resulting in substantially excessive awards, and at the same time leave unimpaired all legimate rights of plaintiffs.

For the purpose of limiting the effect of the Federal Employers' Liability Act to that originally intended by Congress, petitioner respectfully submits that this Court should hold that the refusal by the trial court of the tendered instruction constitutes material error.

Conclusion.

Wherefore, for the reasons above stated, petitioner prays that this Court issue a writ of certiorari to review and reverse the judgment in this case of the Appellate Court of the State of Illinois, First District.

Respectfully submitted,

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APPENDIX.

Opinion of the Appellate Court of Illinois, First District, Third Division.

Mr. Justice Kiley delivered the Opinion of the Court.

This is a suit under the Federal Employers' Liability Act (45 U. S. C. §51 et seq.) by a railroad repairman. Verdict was for plaintiff in the amount of $37,500. Plaintiff remitted $7,500, and judgment was entered for $30,000. Defendant has appealed.

The accident occurred on September 18, 1948. Plaintiff was then sixty-six years old and had been a car repairman for defendant for twenty-eight years. When injured, he was engaged in repairing a grab iron on a box car. He fell from a scaffold.

The scaffold consisted of a wooden horse about ten feet high and several feet wide. The top platform was ten or twelve inches wide. There were five rungs at several levels below the platform. The rungs were about ⅞th of an inch thick. The scaffold or horse was placed near the south end of a steel end box car so that the bent grab iron on the car could be repaired. On each side of the track where the car was placed were concrete walks. Since the grab iron under repair was on the west side of the car end, the scaffold was placed close to the concrete walk west of the rail. The grab iron under repair was the top-most fixed to the car end. It was about 18 inches wide and about 12 feet above the ground. It was bent in toward the car.

The repair work was the joint operation of a fellow workman, using an acetylene torch to soften the grab iron, and plaintiff, using a crowbar to straighten it. Plaintiff's companion worked while seated on the top of the

scaffold. Plaintiff stood on the second rung on the south side of the scaffold. Consequently the scaffold was between him and the car. After the grab iron was heated, plaintiff was told by his co-worker to "pull." He placed the crowbar under the grab iron and attempted to pull the bar upward. It did not bend. He moved the bar and pulled upward again. The bar slipped and plaintiff fell to the concrete walk and was injured.

The issues raised here are whether there was any evidence of negligence sufficient to submit the case to the jury; whether the court erred in instructing the jury and in ruling on admission of evidence; and whether the verdict is excessive.

Plaintiff had the burden of proving that his injury was the result in whole or in part of defendant's negligence or that of its employees. 45 U. S.C. §51; *Payne* v. *Baltimore & Ohio R. Co.*, 351 Ill. App. 186; *Kloetzer* v. *Louisville & N. R. Co.*, 341 Ill. App. 478; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

Defendant was not required to furnish the latest, best or most perfect appliances. The general rule imposes the obligation to furnish reasonably safe equipment suitable for the purpose of the work and where occupations are attended with great and unusual danger, the obligation is to use all appliances readily attainable for the prevention of accidents. *Perryman* v. *Missouri Pac. R. Co.*, 326 Mo. 176, 31 S. W. 2d 4. The rule applied under the F. E. L. A. is that the employer's duty becomes more imperative as the risk increases. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350; *Cheffey* v. *Pennsylvania R. Co.*, 79 F. Supp. 252 The testimony of experts with respect to safer methods used on other railroads is an evidentiary basis upon which the jury can decide whether the equipment and

method of the railroad was reasonably safe, or whether it should have used safer equipment and methods. *Boston and M. R. R. Co.* v. *Meech*, 156 F. 2d 109; *Palum* v. *Lehigh Valley R. Co.*, 165 F. 2d 3.

Defendant's contention that there is no evidence of negligence on its part is to be tested by the well-known rule applicable in determining whether a jury question was presented by the evidence. *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Walaite* v. *C., R. I. & P. Ry. Co.*, 376 Ill. 59. We shall relate only the testimony favorable to the plaintiff and draw the legal inferences most strongly in his favor: Plaintiff's co-worker was in charge of the work. He made the decision when the grab iron has been heated enough so as to bend easily. After heating the grab iron, he told plaintiff to straighten it. Plaintiff was standing on the ⅞ inch rung on the outside of the scaffold. When he "pulled up," both of his arms were above his head and his elbows were level with his shoulders. In this operation there is nothing to hold on to. Defendant has weekly safety meetings at which safety in repair operations was discussed and explained. Plaintiff had been instructed by his foreman to do the work the way in which he was doing it.

The foregoing evidence tends to prove negligence in defendant's repair method and in directing plaintiff's work.

There is further favorable evidence for plaintiff: The torch which plaintiff's co-worker was using had close to a three foot flame capacity. Usually safety paper, asbestos or tin is used to protect the paint during the grab iron straightening process. A good welder can heat a grab iron

and not disturb the paint. If paint is burned it blisters. No safety shield was used during the instant work and the paint was blistered.

The foregoing is further evidence of negligence on the part of plaintiff's co-worker, since an inference is justified that the paint had been softened and could cause the crowbar to slip.

There is further favorable evidence for plaintiff: Any work which is overhead requires good footing. Other repairmen on other roads did this type of work on ladders which enabled the repairman to stand with one foot on one step several inches wide, and one on another, or to sit while working so there is no worry about footing. Neither the "Great Western" nor the "Milwaukee" Railroads use horses such as the one defendant used when the accident occurred. The "Milwaukee" uses platform ladders with ample foot space. If the "Great Western" uses horses, it uses them cross-wise and lays twelve inch planks so as to provide about twenty inches of standing space.

The foregoing testimony tends to prove defendant did not furnish plaintiff reasonably safe equipment for the work purpose.

We think, therefor, that the question of defendant's negligence was for the jury.

Defendant, to sustain its contention that the equipment was reasonably safe, argues that plaintiff had used this same kind of scaffold for twenty-eight years and had never seen an accident result therefrom. The question is not what equipment defendant furnished, and plaintiff used, customarily, but whether there was evidence that

the equipment and method were not reasonably safe. *C., R. I. & Pac. Ry.* v. *Daugaard,* 118 Ill. App. 67; *Midland Valley R. Co.* v. *Bell,* 242 Fed. 803; *Texas and Pacific Ry. Co.* v. *Behymer,* 189 U. S. 468. This conclusion disposes of the argument with respect to the long use, without accident, of the method employed in straightening the grab iron.

Defendant argues also that it is free of any charge of negligence because it was entitled to assume that defendant would use the equipment in a safe manner. The fact that plaintiff may have stood with greater safety between the car and scaffold "would not completely immunize" defendant from liability if the injury was in part due to its negligence, for plaintiff's contributory negligence would merely diminish damages, not bar recovery. *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Virginian Ry. Co.* v. *Viars,* 193 F. 2d 547. Moreover there is evidence that plaintiff had been instructed to stand where he stood. Also, reasonable men might differ on the question whether standing between the car and the scaffold on the 7/8 inch cross-board, using both hands above the head, would have been an appreciably safer position.

In view of our conclusion with respect to what the evidence favorable to plaintiff tended to show, it follows that we see no merit in defendant's complaint with respect to plaintiff's "summarizing instruction." This instruction summarized the issues. It is not vulnerable to the sole contention made, that the charges of negligence had no foundation in the evidence. It is true that the third charge summarized refers to tools, but is also refers to equipment.

Appendix.

The defendant complains of prejudicial error in the trial court's refusal to give its tendered instruction #22. It was as follows:

> "You are instructed that under the present provisions of the Internal Revenue Code of the United States any amount paid plaintiff by defendant under a verdict of this jury is exempt from the payment of federal income taxes for the year of receipt of said amount, although the amount of any dividends, interest, gain, profit or income derived from any such amount paid plaintiff by defendant under a verdict of this jury would not be exempt from the payment of federal income taxes."

In support of its claim defendant relies on *Dempsey* v. *Thompson*, 251 S. W. 2d 42 and *Hall* v. *Chicago & N. W. Ry. Co.*, 349 Ill. App. 175. In the *Hall* case this Court reversed an order of the trial court granting plaintiff a new trial because the defendant in argument told the jury that whatever plaintiff received by way of verdict was not subject to income tax. That case is not authority for the reversal of a judgment for the failure of a trial court to give this cautionary (*Dempsey* v. *Thompson*) instruction.

We infer from a study of the *Dempsey* case that the refused instruction there did not contain the words following the word "although" in the instant instruction. The instruction in that case and this are not the same, and the question before us is therefore different.

Plaintiff in that case argued that if the jury should be instructed as to the tax exemption it should also be instructed that dividends, etc., derived from investment of the award, would not be exempt. The Missouri Court

said that any reference to the tax liability of future income realized from the investment of the award "would tend to confuse and distract the jury and lead it into speculating on the amount thereof."

We see no merit in the claim with reference to Instruction # 22. The instruction was bad for the reason given by the Missouri Court in striking down the contention made there by plaintiff and referred to in the preceding paragraph. The trial court was justified in refusing to give Instruction #22. It is not necessary, therefor, for us to decide the question of the propriety of instructing the jury with reference to tax exemption of personal injury verdicts.

Error is claimed on the basis of the refusal of the trial court to admit into evidence certain posed photographs showing various hypothetical positions in which the work might have been done. These photographs could not have been offered as real evidence, *Ellis* v. *Flanningan*, 253 Ill. 397; *People* v. *Crowe*, 390 Ill. 294, but merely for the purpose of clarification or for demonstrative purposes. Admission for this purpose is within the discretion of the trial court. *Goodrich* v. *Chicago Great Western Ry. Co*,. 148 Ill. App. 579; *Quincy Gas and Electric Co.* v. *Baumann*, 203 Ill. 295. There has been no abuse of discretion in this case, since the jury was sufficiently informed by the evidence and photographs already in evidence of the position of the scaffold and the workmen.

Plaintiff's attorney made arguments based upon failure of defendant to supply photographs of the workman doing the work as defendant claims it might have been done. Defendant's attorney answered the argument. No objections were made by either side. The argument was

under control of the trial judge, and there is no showing that there was abuse of discretion in exercising this control. *Reinmeuller* v. *Chicago Motor Coach Co.*, 341 Ill. App. 178.

Defendant contends the verdict is so excessive that a reversal for that reason must be ordered. It says the jury was "fully and fairly instructed on the proper measure of damages" but that the amount of the verdict demonstrates conclusively that the jury gave no heed to the instructions and apparently made no deduction for plaintiff's contributory negligence.

The jury's verdict awarded plaintiff $37,500. Was this amount so excessive as to indicate passion and prejudice on the part of the jury or to indicate that the jury failed to diminish its award for plaintiff's "contributory negligence?" We have shown that the defendant was not prejudiced by any error in the exclusion of evidence or in the giving or refusing of instructions. Moreover we have shown that the jury may have decided that plaintiff was not negligent. Plaintiff's actual loss of earnings to the time of trial was more than $10,000. In addition to being instructed that actual loss of earnings was a proper element of damage, the jury was told that additional elements were the present value of plaintiff's loss of future earnings, pain and suffering, and physical injuries including permanent disabilities resulting from the injuries.

The accident occured in September, 1948 when plaintiff was sixty-six years old. There is evidence that he was hospitalized for two months where his arm from wrist

to elbow was put in a cast, he had a whistling in his head and was given heat treatment for his back; that up to the trial of the case in October, 1952 he had not been able to walk without support for his back; that as a result of his fall he had suffered a fracture of the larger wrist bone at the joint and fracture of the sacrum; that the fractures of four ribs and a dislocated vertebra could have been caused by the fall; that the back injury could be responsible for his permanently stiff back and for the deficiencies in plaintiff's achilles and patilla reflexes; that the reflex deficiences are permanent; that plaintiff used a cane eight or nine months after leaving the hospital, that he has whistling in his head all the time, cannot sleep well, must be given hot baths several times weekly and must spend about three hours daily in bed; that he has lost his appetite; and that since the accident he has lost more than twenty pounds.

Other testimony was that the vertebral injury could have preceded the injury; also that it did precede the injury; that there was enough arthritis to stiffen the back aside from the injury; that all rib fractures were healed at the time of trial; that plaintiff did not complain of the whistling in the head at the hospital; and that plaintiff was given a permit to return to work in January, 1949, though the doctor did not know what work plaintiff was engaged in.

Assuming that the jury took as true the testimony favorable to plaintiff, we think reasonable men could differ on the question of excessiveness. *Smith* v. *Illinois Central Railroad Co.*, 343 Ill. App. 593.

The trial court presumably thought the verdict was excessive by $7,500 but saw no reason to grant a new trial if plaintiff remitted that amount of the verdict. We cannot say that this ruling was insufficient to assure defendant a fair verdict.

For the reasons given the judgment is affirmed.

Judgment Affirmed.

FEINBERG, P. J. and LEWE, J. CONCUR.

No. 46055

JOHN MARGEVICH,

Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Appellant.

Appeal from Cook Superior. Error to

JUDGMENT.

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error:

THEREFORE, it is considered by the Court that the judgment aforesaid, be AFFIRMED in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant his costs, by him in this behalf expended, to be taxed, and that he have execution therefor.

INDEX.

PAGE.

The Question 1

Summary of Argument 3

Argument 4

I. The question of income taxation is entirely foreign to any action to recover common law damages for personal injuries. The issue is not a federal question of substance; it is a pure common law question which has been decided adversely to petitioner's contention on multiple occasions 4

II. The Congressional Intent 9

Conclusion 17

TABLE OF AUTHORITIES.

Abrahamian v. Nickel Plate R. R. Co., 343 Ill. App. 352, 99 N.E. 2d 153 8

Chgo. G. W. Ry. v. Peeler (8th Cir.), 140 F. 2d 865 11

Chicago & N. W. Ry. Co. v. Curl (8th Cir.), 178 Fed. 2d 497 8

Cole v. Chicago, St. P. M. & O. Ry. Co., D. C. 59 F. Supp. 443, 445 8

Corcoran v. City of Chicago, 73 Ill. 567, 580, 27 N.E. 2d 451 16

Davidson v. Loomis, 282 Ill. App. 515, 518, 519 11

Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 ..... 12, 13, 15

Detroit, T. & I. R. Co. v. Pitzer, 42 O. L. A. 494, 61 N.E. 2d 93 11

Fairmount Glass Works v. Fork Coal Co., 287 U. S. 474, 481, 485 4

Goldberg v. Capitol Freight Lines, 382 Ill. 283, 289, 47 N.E. 2d 67, 71 4

Goodrich v. Sprague, 385 Ill. 200, 202, 203, 208, 32 N.E. 2d 897 16

Gorczynski v. Nugent, 402 Ill. 147, 151, 83 N.E. 2d 495, 497 4

Hall v. Chicago & North Western Ry. Co., 1 Ill. App. 2d 552, 118 N.E. 2d 29 15

Hall v. Chicago & North Western Ry. Co., 349 Ill. App. 175, 110 N.E. 654 14

Hecker v. I. C. R. R. Co., 231 Ill. 574, 577, 578, 83 N.E. 2d 456, 457, 458 4

Hilton v. Thompson, 360 Mo. 177, 185, 227 S.W. 2d 675, 681 13

King v. Denver & R. G. W. R. Co., 116 Ut. 488, 503, 211 Pac. 2d 833 11

Majestic v. Louisville & N. R. Co. (6th Cir.), 147 F. 2d 621, 626 8

McCarthy v. Palmer (2nd Cir.), 113 F. 2d 721 11

O'Donnell v. Great Northern Ry. Co., 109 F. 343 Ill. Supp. 590, 591 8

Smith v. Penn. R. Co., 59 O. L. A. 282, 288, 99 N.E. 2d 501 8

Stokes v. United States (2nd Cir.), 144 F. 2d 82, 87 8

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 554 ..... 2, 4

Wetherbee v. E. J. & E. Ry. Co. (7th Cir.), 191 F. 2d 302 16

Wilkerson v. McCarthy, 336 U. S. 53, 62 ..... 5, 10

STATUTES.

Chap. 110, Sec. 216 (3) (b), Ill. Rev. Statutes 4

Vol. 33, Boston U. L. R., 114, 115 ..... 6, 11, 13

9 A. L. R. 2d 321 6

Title 26 U. S. C. A. 22(b) 9

Title 45 U. S. C. A. 51, et seq. 9

Chap. 110, Sec. 259.32, Ill. Rev. Statutes 15

Chap. 110, Sec. 216, Par. 92, Ill. Rev. Statutes 16

TEXTS.

Sutherland on Damages, 4th Ed., Vol. 5, Sec. 1331, p. 5088 ..... 2, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

The Question.

The question presented is neither novel nor of federal character. On several occasions it has been adjudicated adversely to Petitioner's position. Succinctly stated, it is: Can a defendant in any personal injury action mitigate the measure of damages by requesting the court to instruct the jury in a personal injury action that the award is not subject to income tax?

It should be noted at the outset that there is no complaint that the jury was not correctly instructed on the measure of damages. In fact, Petitioner tacitly admits this to be true. Thus that which constitutes the criterion of damages is not an issue.

It is fundamental that in an action to recover damages under the Federal Employers' Liability Act common law elements of damages as recognized in the Federal Courts are the proper considerations. (*Vicksburg and M. R. Co.* v. *Putnam*, 118 U.S. 545, 554; Sutherland on Damages, 4th Ed., Vol. 5, Sec. 1331, P. 5088.)

Since Petitioner admits that such were employed here, authorities that compensation should not exceed the injuries suffered or those defining elements of damages in death actions under the Federal Employers' Liability Act have no pertinency whatsoever.

Summary of Argument.

In an action to recover damages for personal injuries, whether the award is tax exempt is entirely foreign to the issues. So long as the instructions define the elements of damages proper for the consideration of the jury—as it is admitted was done here—there can be no complaint. Income tax laws have nothing whatsoever to do with the definition of damages.

The assumption that jurors might consider income tax in computing damages is an element based on a premise at loggerheads with the foundation of trial by jury, namely, that the jury follows only that law as given by the court.

The question of income tax is one that concerns the individual and his government; a defendant tort feasor cannot employ an exemption in the income tax laws to mitigate damages.

What the individual will receive net from an award cannot justify an instruction concerning taxes. If that were so, the jury could be instructed on many matters foreign to the case, such as attorney's fees, court costs, etc.

ARGUMENT.

The question of income taxation is entirely foreign to any action to recover common law damages for personal injuries. The issue is not a federal question of substance; it is a pure common law question which has been decided adversely to petitioner's contention on multiple occasions.

Petitioner would invoke the jurisdiction of this court by stating that the question of whether in a personal injury action by employee a railroad company is entitled as a matter of law to have the jury instruct that whatever award the employee recovers is not subject to taxation. It is, however, fundamental as we have pointed out, that in any action for injuries by an employee under the Federal Employers' Liability Act the measure of damages is the same as that provided by the Federal common law. (See *Vicksburg and M. R. Co.* v. *Putnam,* 118 U.S. 545, 554. See Sutherland on Damages, 4th Ed., Vol. 5, Sec. 1331, P. 5088.)

The elements of damage are well delineated. And Petitioner's statement that "The court below decided the issue in a manner inconsistent with the basic principle that compensation in Federal Employers' Liability Act cases should equal, but not exceed, the extent of the injury (Pet. p. 9) demonstrates the want of jurisdiction here. It admits that the elements submitted to the jury were proper. In effect, it complains about the amount of the verdict. However, there was an affirmation of the verdict by the Appellate Court of Illinois. This constitutes a non-reviewable finding. (Chap. 110, Sec. 216(3)(b) Ill. Rev. Stats. 1951; *Gorczynski* v. *Nugent,* 402 Ill. 147, 151 83 N.E. 2d 495, 497; *Hecker* v. *I. C. R. R. Co.,* 231 Ill. 574, 577, 578, 83 N.E. 2d 456, 457, 458) And neither this court (*Fairmount Glass Works* v. *Fork Coal Co.,* 287 U.S. 474, 481, 485) nor the Illinois Supreme Court (*Goldberg* v. *Cap-*

itol Freight Lines, 382 Ill. 283, 289, 47 N.E. 2d 67, 71), which denied this Petitioner's petition for leave to appeal from the Illinois Appellate Court, is concerned with the amount of damages. Petitioner would suggest that perhaps the jury did not decide the case on the evidence and according to the court's instructions. It suggests many things *which the jury might have considered.* However, Petitioner's argument is contrary to the very fountainhead of trial by jury, namely, that the triers of the facts decide the case on the evidence and according to the court's instructions. Indeed, there is a presumption, as a matter of law, that the jury has thus conducted itself.

As this court had occasion to comment in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 62:

> "Courts should not assume that in determining those questions of negligence, juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' *Aikens* v. *Wisconsin*, 195 U.S. 194, 206."

And here it is to be remembered that there is no complaint that the jury was not properly instructed on the measure of damages.

It is true, there are many things a jury or any group of human beings may have thought of. But if the courts were to indulge in such speculation to foreclose by instructions all possible avenues of thought, regardless of how foreign they might be to the issues of the case, the jury system would be emasculated.

Then, too, if the jury were to be instructed upon the question of income tax, improper subject matter would

be submitted for its consideration. As a matter of fact, as the cases hereinafter cited demonstrate, the courts have jealously guarded the injured against a tort feasor using this avenue. *Thus they say the gross earnings are the measure of damages and point out how the question of income tax is a matter between the individual's government and himself.* These cases Petitioner would attempt to avoid by stating that in holding evidence of income tax deductions is not proper in determining earnings already lost or to be lost in the future and are not decisive concerning whether a jury can be instructed upon the fact that the award is exempt from payment of income tax. But if, as the authorities hold, it is inadmissible to show tax deductions in computing even earnings to be lost in the future, how can one properly ask an instruction upon improper evidence. Or, as a law review article has stated,

> "If the jury is not permitted to make calculated income tax deductions on a plaintiff's future earnings in assessing that phase of the damages, what warrants the * * * ruling that juries must be instructed of the tax exempt status of the entire award?"[1]

The matter delineates itself to the query whether a defendant in a personal injury case can mitigate the element of damages by showing that the award is tax exempt. That such is the issue is well demonstrated by the language of the Annotator at Page 321, 9 A.L.R. 2d, wherein it is said:

> "While it is manifest that very generally the matter of income tax liability has not been taken into consideration in fixing the amount of damages for impairment of earning capacity, or in determining

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[1] Vol. 33, Boston U. L. R., 114, 115.

whether a particular award of such damages is excessive, there are surprisingly few cases actually dealing with the question whether income tax liability should be considered in fixing such damages?

"Where the question has arisen, in reported cases, the courts generally have been of the opinion that in fixing damages for impairment of earning capacity the fact that the damage award will be exempt from income tax, whereas if the awardee had not sustained the loss of earning capacity and had gone on to work and received the income forming the basis of such damage award, he would have become subject to income tax liability on such earnings, is not a matter to be taken into consideration and is no ground for diminishing the amount of damages for impairment of earning capacity." (Underlining ours.)

The Annotator then continues thus:

"The most complete discussion of the question considered in this annotation is found in *Billingham* v. *Hughes* (Eng) (1949) 1 K B 643, 9 A L R 2d 311—C A, in which the three judges of the Court of Appeals were agreed that in fixing the amount of damages to be awarded a doctor for impairment of his earning capacity, by reason of personal injuries caused by the negligence of the defendant, *the matter of income tax liability is not to be taken into consideration and, specifically, that the amount of damages based upon loss of earning capacity should not be reduced because the damage award would be exempt from income tax, even though, if the injury had not occurred, the plaintiff's future earnings from his profession would, as earned, become subject to liability for income tax. It was considered that income tax liability was a matter strictly between the plaintiff and the taxing authorities, in*

which the defendant tort feasor had no interest; that under the principle of restitutio in integrum the plaintiff was entitled to be put in the position in which he would have been vis a vis his patients, that is, to receive his fees in full, without regard to questions as to his ultimate liability to the taxing authorities; and that to take income tax liability into consideration would not only upset the long-continued practice of the courts not to do so in estimating damages but would also involve great difficulties in estimating the amount of tax which might accrue in the future in the case of any particular plaintiff. As expressed by Birkett, J., 'The amount of tax he might have to pay might differ from year to year; but with all these things the defendants certainly have nothing to do, and are equally certainly not entitled to say that, as wrong-doers, they should receive an abatement of the damages they ought to pay by deducting tax, solely for their benefit.' " (Italics ours.)

We invite the court's attention to this complete annotation.

Nor is this subject new to this Petitioner. See *Chicago & N. W. Ry.* v. *Curl* (8th Cir.), 178 Fed. 2d 497 (decided in 1950), where the court, on the basis of *Stokes* v. *United States* (2d Cir.), 144 F. 2d 82, 87, *Cole* v. *Chicago, St. P. M. & O. Ry. Co.*, D. C. 59 F. Supp. 443, 445, *Majestic* v. *Louisville & N. R. Co.* (6th Cir.), 147 F. 2d 621, 626), held that evidence concerning income taxes was not admissible, that gross earnings were the measure of damages, and that whatever deductions made or to be made in the future was not a proper consideration.

In addition to the foregoing authorities, see *Smith* v. *Penn. R. Co.*, 59 O. L. A. 282, 288, 99 N.E. 2d 501, *O'Donnell* v. *Great Northern Ry. Co.*, 109 F. Supp. 590, 591, and *Abrahamian* v. *Nickel Plate R. R. Co.*, 343 Ill. App. 352,

No. 450179 (Abstract only), 99 N.E. 2d 153, holding an instruction properly refused which referred to the question of income tax.

The Congressional Intent.

Petitioner states that since the Federal Employers' Liability Act was passed prior to the first income tax law and the income tax law has been amended since the passage of the Federal Employers' Liability Act, the income tax law or alterations in it should affect the Federal Employers' Liability Act. Let us dispose of this contention immediately.

In the first place, the income tax law is not a component part of the Federal Employers' Liability Act. One has nothing to do with the other. The only similarity between them is that they are both acts of Congress.

Secondly, this is an argument which should be addressed, not to the judicial branch, but rather to the legislative arm of the government.

Thirdly, this provision providing for exemption of an award for sickness and injuries was passed in 1918. (Title 26 U.S.C.A. 22(b)) It has been changed on numerous occasions since that date, as the annotation indicates. At no time has the substance of the law been changed, although the Federal Employers' Liability Act was, of course, in full force and effect. Moreover, the Federal Employers' Liability Act was amended in 1939. (Title 45 U.S.C.A. Sec. 51, et seq.) At that time, however, Congress, with full knowledge that the income tax exemption was on the statute books, did not change the measure of damages recoverable in actions under the Federal Employers' Liability Act.

The very language of the Internal Revenue Code makes it unmistakably clear that Congress, in excluding from gross income the proceeds of actions upon or settlements of claims for personal injury, acted for the benefit of the injured person, not for the benefit of the wrongdoer.

To permit a jury to consider the income tax exemption of the injured in assessing damages against his employer, who must be culpable on the basis of common law damages, is to permit the employer to employ the Internal Revenue Code, designed for the benefit of the injured, to mitigate the damages.

These considerations become more cogent when it is recalled that the Petitioner may deduct from its gross earnings every cent it pays to the injured plaintiff. According to the position taken by Petitioner, the will of Congress would not only be frustrated, but actually defied.

Then, too, there are, in addition to the federal decisions on this matter and apart from the intent of Congress, many fundamental reasons why the question of income tax should not be made part of the case.

First, the jury was correctly instructed on the measure of damages. They were likewise specifically told elements that they could not consider in awarding damages. How, then, can it be said that a jury might think about income tax? Indeed, it is well established that there would be no purpose in giving a jury instructions, if it is to be assumed that the jurors do not follow them. (*Wilkerson* v. *McCarthy*, 336 U. S. 53, 62.)

Secondly, if a court were to tell a jury that whatever sums are received by the plaintiff are free from income tax, it would be violating an axiomatic principle that the status of the parties is immaterial. The measure of damages is defined by certain well established principles.

These were properly set forth in the given instructions. What the plaintiff does with this money when he obtains it, whether he must pay a tax, whether it will make a plaintiff richer, or a poor plaintiff a man of substance is no concern to the jury or the defendant. If such an instruction were proper, the converse must likewise be true, namely, that the jury should be instructed that whatever the corporation would pay the injured, it could be deducted from its income tax payments, since its operating profits might thus tend to be less. "Evidently the effect and purpose is to diminish whatever compensation might be granted." (*)

But why should a tort feasor be allowed to mitigate damages by virtue of the fact that the injured has to pay income tax on his earnings or that what he receives as an award is free from taxation? The tort feasor has nothing to do with the question of taxes—a question between the plaintiff and his government. Why should the damages the tort feasor has brought be abated at the loss of the individual? Certainly, if the injured had an accident policy which paid him one thousand dollars for each week of his disability, the defendant could not show it in mitigation, nor could the defendant show that the injured medical expenses were paid by an accident policy. (*Davidson* v. *Loomis*, 282 Ill. App. 515, 518, 519.) Nor could the fact that an injured railroad employee was receiving a pension be admitted in evidence. *Chgo. G. W. Ry.* v. *Peeler* (8th Cir.), 140 F. 2d 865; *McCarthy* v. *Palmer* (2nd Cir.), 113 F. 2d 721; *Detroit, T. & I. R. Co.* v. *Pitzer*, 42 O.L.A. 494, 61 N.E. 2d 93; *King* v. *Denver & R. G. W. R. Co.*, 116 Ut. 488, 503, 211 Pac. 2d 833.

(*) Vol. 33 Boston U. L. R., 114, 115.

Again, to allow the question of income tax to be gone into could involve the trial of many matters outside the issues raised. Thus there may well be an appeal, and during the pendency of that appeal, the income tax laws could be changed so that by the time the injured receives the payment of his award, it would be taxable. All of us are familiar with the retroactive character of our present tax laws.

Lastly, the plaintiff is required to pay income tax on the interest the judgment earns—a circumstance which well illustrates the weakness of the petitioner's argument.

Dempsey v. *Thompson*

Petitioner relies upon the decision of a Missouri Supreme Court, *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42. There the trial court refused to give the tendered instruction on the exemption of award from income taxation. But the judgment for plaintiff was affirmed. Accordingly, this language was mere dictum. There is more, however. It held no inquiry can be made of a witness concerning exemption from taxation. It likewise held that a defendant should not be permitted to argue the question of income tax to the jury, and that the measure of damages was gross earnings, and not earnings after income tax deductions had been made. It then concluded that defendant was entitled to an instruction that any amount awarded the plaintiff was not subject to income taxation. But even this anomalous case does not aid petitioner. *It held that it would be improper to instruct the jury that whatever income the verdict bore was tax free because such would be "speculating"* (p. 46 S.W. 2d). Here petitioner's refused instruction went into the question of taxation upon

the amounts of any dividends, interest, gain or profit from the amount of the award. (App. p. 26 Pet.) Moreover, the Appellate Court pointed out the distinction between the instruction suggested by the court in the *Dempsey* case, supra, and the one tendered in this case, and stated (App. p. 26 Pet.)

> "We infer from a study of the *Dempsey* case that the refused instruction there did not contain the words following the word 'although' in the instant instruction. The instruction in that case and this are not the same, and the question before us is therefore different."

Then, too, the same Missouri Supreme Court two years earlier, in the case of *Hilton* v. *Thompson*, 360 Mo. 177, 185, 227 S.W. 2d 675, held a tendered income tax instruction properly refused, pointing out (p. 681 of S.W. 2d):

> "The jury was properly instructed on the factors to be considered in fixing the amount of respondent's damages and it would not have been proper to inject into the case an extraneous issue regarding the tax exempt status of the damages which might be awarded."

"With due deference and respect to the Missouri Supreme Court, it is submitted that their novel ruling is inconsistent with the instant opinion itself as well as the several prior cases dealing with the connected topic. A mandatory instruction to a jury that any award is tax exempt not only invites conjecture in arriving at the particular award, but clearly prejudices the plaintiff's cause."[1]

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[1] Vol. 33 Boston U.L.R. 116.

Hall v. *Chicago & North Western Ry. Co.*

Hall v. *Chicago & North Western Ry. Co.* is not properly described in the footnote at p. 13 of the Petition. There the defendant argued the nontaxability of the award. The trial court sustained the objection. Plaintiff's motion for a new trial was allowed. But the Appellate Court of Illinois, First District, First Division, in reversing this order of the trial judge, held it proper to make such argument, relying on *Dempsey* v. *Thompson, supra,* which *held that there could be no argument by counsel concerning income tax.* Thus this was an interlocutory order by an intermediate court. Petition for leave to appeal could not be obtained until a final judgment was entered. Plaintiff, in accord with the opinion of the Appellate Court in the interlocutory order (349 Ill. App. 175, 110 N.E. 654)[4] had the judgment in his favor restored. There was an appeal by both

[4] The opinion in *Hall* v. *Chicago & North Western Railway Co.,* 349 Ill. App. 175, 110 N.E. 654, is analyzed in Vol. 21, August 1953, No. 1, pp. 156, 157, University of Chicago Law Review, and the note is entitled: "Propriety of Comment on Non-Taxability of Personal Injury Verdicts." There it is pointed out: (1) The Appellate Court was primarily concerned with the protection of the defendant (2) The Appellate Court reasoned that jurors might erroneously assume that an award was taxable; (3) The Appellate Court ignored the possibility that the plaintiff might be prejudiced by such comment; (4) The decision is based upon the assumption that the jury will disregard the court's instructions, whereas the law is well established that a court might justifiably rely on the presumption that the jury adheres to its instructions; (5) Both parties are adequately protected by proper instructions concerning the measure of damages without reference to the taxability of the award.

parties to the Appellate Court, and the same three judges reversed the judgment in plaintiff's favor. (*Hall* v. *Chicago & North Western Ry. Co.*, 1 Ill. App. 2d 552, 118 N.E. 2d 29.) Then for the first time plaintiff had an opportunity to appeal from the order of the Appellate Court reversing the trial court's decision granting plaintiff a new trial and also from its order reversing the judgment in his favor.

An appeal to the Illinois Supreme Court from the Illinois Appellate Court is not a matter of right but is accomplished through petition for leave to appeal. (Chap. 110, Sec. 529.32, Ill. Rev. Statutes 1953) *The Illinois Supreme Court on May* 18, 1954, *allowed Hall's petition for leave to appeal, both from the order of the Appellate Court, in which it held it proper to argue income tax exemption* (349 *Ill. App.* 175, 110 N.E. 654) *and also from the judgment of the Appellate Court setting aside a verdict of the jury in favor of the plaintiff.* (1 *Ill. App.* 2d 552, 118 *N.E.* 2d 29.) The cause was docketed in the Supreme Court of Illinois under No. 33264.

On the very same day, namely, May 18, 1954, that Hall's petition for leave to appeal was allowed, the Illinois Supreme Court denied this Petitioner's petition for leave to appeal from the judgment of the Illinois Appellate Court in Cause No. 33203 of the Supreme Court.

Accordingly, neither of the *Hall* opinions is final, even in Illinois. Since the *Hall* case (349 Ill. App. 175, 110 N.E. 654) is an interlocutory order by an intermediate court which is now being reviewed, and *since it does not involve an instruction on the question of income tax,* we shall not dwell at length upon it. We might say that *Dempsey* v. *Thompson, supra,* upon which it solely relied, specifically holds that it is improper to make such argument.

The Measure of Damages.

Petitioner would seek to distort the rule that the worth of future earnings must be reduced to their present value so as to justify this instruction. Of course, there is no complaint that the jury was not properly instructed. The very fallaciousness of Petitioner's argument becomes obvious when the question is stated thus: *Can the defendant in a personal injury case show what the injured actually receives out of the award?* If that be so, then would it not be proper to call the jury's attention to the fact that attorney's fees must be paid out of any judgment? If this rationalization be correct, why then not inform the jury that the costs of litigation are not included in the award returned by them.

And how, we ask, can Petitioner square this argument with that line of authorities holding that gross wages, not wages paid or to be paid after income tax deductions, are the measure of damages?

Lastly, we are gven some language from *Wetherbee* v. *E., J. & E. Ry. Co.* (7th Cir.), 191 F. 2d 302, concerning amounts awarded in personal injury cases. In that case, the court pointed out that it would not review a judgment for excessiveness. (p. 309.) However, Petitioner in an Illinois court not only has the benefit of the ability of the trial judge to order remittitur on a motion for a new trial, but is further permitted to question damages in the Illinois Appellate Court. (Chap. 110, Sec. 216, Par. 92, Ill. Rev. Statutes, 1953; *Corcoran* v. *City of Chicago*, 73 Ill. 567, 580, 27 N.E. (2d) 451; *Goodrich* v. *Sprague*, 385 Ill. 200, 202, 203, 208, 32 N.E. 2d 897.

Conclusion.

The question Petitioner seeks to raise has already been properly adjudicated by the courts. Moreover, it is a common law matter without specific peculiarity to the Federal Employers' Liability Act.

Certiorari here would serve no function in the administration of justice. It is respectfully submitted that the Petition for Writ of Certiorari to the judgment of the Appellate Court of the State of Illinois, First District, be denied.

Respectfully submitted,

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OCT 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 270

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

JOHN MARGEVICH,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The crux of respondent's brief consists of a series of statements which in effect concede the principal argument in our petition. We have pointed out that in the absence of the instruction refused below, there is a compelling tendency on the part of juries to offset the presumed effect of income taxes on damage awards by increasing the award to the extent deemed necessary to give plaintiff the net amount intended, after taxes. If such in fact is the effect of a refusal to render this instruction when offered, then a situation of vital concern to this court is presented, inasmuch as the Federal Employers'

Liability Act is thereby made the vehicle for the recovery of damage awards far in excess of the compensatory measure intended by Congress and established by numerous decisions of this Court (Pet. 7, 8).

That an increase in damage awards in fact results from the refusal of the instant instruction is repeatedly recognized in respondent's brief. The import of this recognition is undoubtedly increased when counsel's broad experience in the trial of personal injury matters is considered.

Respondent's complete agreement with this vital phase of our argument is expressed at the outset of respondent's brief by the restatement of the question in this form (Res. 1):

> "Can a defendant in any personal injury action mitigate the measure of damages by requesting the court to instruct the jury in a personal injury action that the award is not subject to income tax?"

Thereafter respondent further states at page 10:

> "To permit a jury to consider the income tax exemption of the injured in assessing damages against his employer, who must be culpable on the basis of common law damages, is to permit the employer to employ the Internal Revenue Code, designed for the benefit of the injured, to mitigate the damages."

Thus in again conceding that a jury's knowledge of the Internal Revenue Code will result in mitigation of damages, respondent also suggests that plaintiffs have a type of vested right in keeping juries ignorant of the simple fact that personal injury damage awards are nontaxable. For obvious reasons, respondent argues that nothing should be permitted to occur which might impair this basic misunderstanding by the jury.

Respondent again urges at page 11:

> "But why should a tort feasor be allowed to mitigate damages by virtue of the fact that the injured has to pay income taxes on his earnings or that what he receives as an award is free from taxation."

This statement further typifies respondent's approach to the issue in this case, which approach is characterized by a refusal to distinguish between the mitigation of damages by an amount to which a plaintiff might be entitled as compensation for injuries, and mitigation by an amount far in excess of any compensatory damages intended by the jury. It is apparently respondent's position that all measures calculated to mitigate damages are equally reprehensible, even where the proposed reduction consists of nothing other than the elimination of an undeserved and unintended windfall.

Respondent also seeks to equate a simple instruction concerning the effect of the federal income tax on damage awards with the jury's being informed of pensions or insurance awards from which an injured plaintiff might benefit. Such benefits, of course, constitute partial compensation for injuries suffered. As respondent correctly suggests, it is generally considered improper to inform the jury of such benefits because of a possible tendency by the jury to limit damages against a defendant to an amount necessary to make up the difference between the total compensation intended and the benefits otherwise received (Res. 11). The purpose of this rule of law is to hold tort-feasors liable for compensation for the full extent of injuries caused. In this basic respect, the rule cited by respondent and the instruction offered below serve the identical purpose, for the sole effect of the jury's certain knowledge of the non-taxability of damage awards

is to preclude the allowance of an additional amount of damages deemed necessary by the jury to offset the erroneously presumed effect of income taxes. The result in both cases is to effectuate to a greater degree the frequently announced principle that the proper measure of damages and of a tort-feasor's liability is compensation for injuries received, no more and no less.

In this regard respondent also suggests that if the instruction in issue is proper, then it is equally proper to instruct that any damage award paid by a defendant corporation is deductible from gross revenue for income tax purposes (Res. 11). Here respondent is plainly in error. Aside from the fact that the instruction would be accurate only if the corporation reported net profits, the more basic objection is that the law is not concerned with the economic effect on a tort feasor of its paying a damage award in an amount necessary to compensate the injured plaintiff. Such an instruction would in fact be identical in principle with informing the jury that defendant is insured and will suffer no out-of-pocket loss.

Respondent also argues that the question presented in the petition is a pure common law question, not limited to the measure of damages in F.E.L.A. cases. To this observation petitioner demurs. In *Chesapeake & Ohio Railway Co.* v. *Kelly*, 241 U. S. 485 (Pet. 8), the question decided was similarly applicable to all common law actions for damages resulting from personal injuries. There, this Court did not hesitate to apply to the measure of damages in F.E.L.A. cases, well-established common law principles having general application to personal injury actions. The *Kelly* case holds that the giving of an instruction defining the elements of dam-

ages was not sufficient to cure the trial court's error in refusing a present value instruction. That case effectively disposes of the contention made on page 3 of respondent's brief that so long as the instructions define the elements of damages proper for the consideration of the jury, there can be no complaint.

In that portion of its brief captioned "The Congressional Intent", respondent asserts that our argument should be addressed to Congress rather than to this Court. Respondent apparently misconstrues our position. We do not suggest that this Court override the Internal Revenue Code in any respect. We only argue that fairness to defendants requires that the jury be advised accurately as to the effect of the law on damage awards. Certainly it is not the function of Congress or of the legislative branch to prescribe the instructions to be given by courts in personal injury actions. It is no more the function of Congress to legislate on the question presented here, than it would have been to have passed a law requiring the instruction upheld in the *Kelly* case, regarding the discounting of future earnings to present value.

By way of summary it may be said that the utter inconsistency of respondent's entire argument is reflected in the following observations. Respondent states that it must be presumed that the jury will do its duty and determine any damages in accordance with the law (Res. 5). If such is the case, then the jury should be presumed to have considered that damage awards for personal injuries are not subject to the income tax. Thus, respondent might have been expected to urge that any instruction tending to vest the jury with certain knowledge of this fact would have no effect in the fixing

of damages. Yet respondent has repeatedly asserted that if such information is given to the jury, the inevitable result is to lessen the amount of damages awarded. We can scarcely conceive of a more persuasive statement of the intrinsic logic of our position, for here is respondent's own admission that in the absence of the instruction here in issue, juries will inevitably tend to award damages in excess of the actual compensation intended.

We respectfully submit that proper administration of the Federal Employers' Liability Act requires action by this Court to terminate this particular cause of excessive damage awards which even respondent concedes to exist.

Conclusion.

Wherefore, for the reasons stated above and in the original petition, petitioner prays that this Court issue a writ of certiorari to review and reverse the judgment in this case of the Appellate Court of the State of Illinois, First District.

Respectfully submitted,

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